

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**DAVID PUPKIES**

Claimant

VS.

**MCMULLEN BROTHERS, INC.**

Respondent

AND

**ZURICH US INSURANCE CO.**

Insurance Carrier

Docket No. 1,000,486

**ORDER**

Respondent and its insurance carrier (respondent) requested review of the January 17, 2006, Award by Administrative Law Judge Brad E. Avery. The Board heard oral argument on May 9, 2006.

**APPEARANCES**

Stanley R. Ausemus, of Emporia, Kansas, appeared for the claimant. Wade A. Dorothy, of Lenexa, Kansas, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award. The record also includes the October 15, 2004, court-ordered independent medical examination (IME) report by Peter V. Bieri, M.D., which includes his task loss opinion utilizing the task list prepared by Mr. Doug Lindahl.<sup>1</sup>

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<sup>1</sup>A task loss opinion from Dr. Bieri was specifically requested by the ALJ. Therefore, it is admissible under K.S.A. 44-516. In addition, during oral argument to the Board, the parties agreed that Dr. Bieri's task loss opinion should be considered as part of the court-ordered IME report.

**ISSUES**

The Administrative Law Judge (ALJ) found that claimant had a 10 percent functional impairment to the body as a whole based on the opinion of Dr. Bieri. Judge Avery found claimant failed to make a good faith job search post accident and, therefore, imputed a post accident average weekly wage to claimant of \$320 based upon claimant's ability to earn wages according to the testimony of Mr. Lindahl. As this was less than 90 percent of claimant's pre-injury average weekly wage (AWW), the ALJ also found that claimant was entitled to a work disability. The ALJ awarded claimant a permanent partial disability of 48.5 percent based on a 65 percent wage loss and a 32 percent task loss. The ALJ adopted the task loss opinion of Dr. Pedro Murati. It appears that the ALJ did not consider the task loss opinion given by Dr. Bieri. "The only doctor to enter a task loss into evidence (received by the court) was Dr. Murati who found claimant was unable to perform 6 of the 19 tasks defined by Mr. Lindahl. The court finds claimant has a 32 percent task loss."<sup>2</sup>

Respondent contends that claimant did not make a good faith effort to return to work with respondent. Respondent asserts that claimant made no effort to become employed or return to work at respondent, even though he admitted he was told that he would always have a job with respondent after his release from medical treatment. Accordingly, respondent argues that claimant's Award should be limited to his functional impairment of 10 percent to the body as a whole. Nature and extent of claimant's disability is the only issue raised for the Board's review. Respondent does not dispute the ALJ's finding that a 10 percent impairment of function resulted from the work-related injury. Accordingly, the finding is affirmed.

Claimant asserts the ALJ's Award should be affirmed in all respects.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant began working as a truck driver for respondent in 2000. On July 30, 2001, he was attempting to attach an air chute in his trailer. He was unable to reach the top of his trailer, so he was being lifted up on a forklift. Somehow he slipped and fell off the forklift.

Claimant felt immediate pain in his neck and low back. On a scale of 1 to 10, he rated the pain at a 6. Claimant did not immediately seek medical attention, as he was in California. A few days later, after he had returned home, he made an appointment with Dr. Steven Parker, a chiropractor. After he made the appointment, he let respondent know

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<sup>2</sup>ALJ Order (Jan. 17, 2006) at 3.

he had done so. At first, claimant paid Dr. Parker himself, but when he started getting worse, respondent took over the medical expenses. Claimant continued to work as a truck driver but did not drive as frequently. Nevertheless, his condition worsened, and he started limping. By October 2, 2001, Dr. Parker took him off work. Claimant called respondent about not being able to drive. He talked to the dispatcher, who he only knew as "Bruce." Bruce told him that he would always have a job with respondent after he was released. It is important to note that neither "Bruce" nor any other representative of the respondent testified in this matter. It is unknown whether Bruce had any authority to retain or rehire claimant or whether respondent would have accommodated claimant's restrictions.

Claimant's condition continued to worsen. Dr. Parker sent claimant for an MRI. After receiving the results of the MRI, Dr. Parker advised claimant to stay home and stay off his feet. Claimant went from a limp to using a walker to needing a wheelchair to being bedridden. This occurred rapidly—in a three to four month period. In May 2002, he was sent to the hospital in Emporia for management of his pain in his neck and back. After three days, he was returned home. On May 31, 2002, he was taken by ambulance to a hospital in Wichita. In addition to his problems with his neck and back, claimant was diagnosed with rheumatoid arthritis and lung cancer.

Claimant has been unable to return to work and is receiving Social Security disability and Medicare. He has not earned any wages whatsoever since October 2, 2001.

Claimant still has constant pain in his neck in the area of his shoulders to the base of his neck. It bothers him to turn his head. Claimant also has constant pain in his low back in an area three or four inches above his belt line. On a scale of 1 to 10, he placed his pain in his neck and in his low back at 8. His pain runs into his shoulders and legs. He has numbness between his left hip and his waist. His left thigh sometimes burns at night. The pain had been only in his left thigh, but by the date of the Regular Hearing he was starting to experience pain in the right. He has to take pain pills and patches and sleeping pills in order to sleep. He cannot stand for more than an hour or his legs start getting weak, and he cannot sit for long periods of time. Claimant indicated that surgery has been recommended, but he is afraid of it. At the time of the regular hearing, he was not receiving any medical treatment for his work-related injury.

Claimant has not attempted to return to work anywhere since he left work at respondent in October 2001. He did not know whether he would be able to pass the Department of Transportation physical in order to return to work. When asked if it was his back condition or lung cancer that is preventing him from working, claimant stated, "To be honest, it's my back and my neck."<sup>3</sup> He believes the doctors will not release him to return to work because of a combination of his lung cancer, rheumatoid arthritis, and back condition.

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<sup>3</sup>R.H. Trans. at 28.

Claimant saw Dr. Paul Stein, a board certified neurosurgeon, at the request of his attorney on April 30, 2002. At that time, claimant was complaining of widespread pain. He gave a history of an accident at work where he fell, landed on his feet, and twisted. He initially had soreness in his upper and lower back. That discomfort spread up to his shoulders and his neck and became more intense.

Dr. Stein reviewed the MRI films and said the both the cervical and thoracic scans were consistent with claimant's age, with some mild degenerative changes. Upon examination of the claimant, Dr. Stein had difficulty in making a specific diagnosis. Claimant's symptomatology was widespread, and the findings were unusual. Dr. Stein thought claimant had a back sprain but found a substantial emotional or psychological functional overlay, which would explain a lot of the symptoms. On the other hand, some findings were more physical or organic in nature. Dr. Stein recommended psychological testing and a rheumatologic evaluation.

After Dr. Stein's examination of claimant, claimant was diagnosed with rheumatoid arthritis and lung cancer. When asked if a diagnosis of rheumatoid arthritis was consistent with claimant's complaints of widely disseminated pain and the findings he made upon his examination, Dr. Stein answered that he would be surprised if the rheumatoid arthritis was the explanation for all of claimant's problems. Dr. Stein had not known of claimant's diagnosis of cancer and said that if there was skeletal metastatic disease from the cancer, it would explain a lot of his discomfort. However, there is no evidence that claimant's cancer had metastasized. Dr. Stein did not think that claimant's fall would have caused either the cancer or the rheumatoid arthritis.

Dr. Stein was asked to provide a permanent impairment rating for claimant. He stated that the most he would expect from claimant's injury would be a lumbar strain, from which no permanent disability would be anticipated. Dr. Stein testified that he was unable to make a determination in regard to an impairment rating. He also opined that with the mechanism of the injury, claimant likely would not have had an injury sufficient to disable him from returning to work as a truck driver. Dr. Stein would not venture an opinion on whether claimant was capable of doing or not doing certain tasks listed on a task list prepared by Doug Lindahl.

Dr. Pedro Murati, who is board certified in rehabilitation and physical medicine, saw claimant at the request of his attorney on November 21, 2002. At that time, claimant was complaining of low back pain radiating down both legs and neck pain. Claimant gave him a history of falling on July 30, 2001. Claimant also told Dr. Murati about a previous work-related injury in 2000 where he hit his back on a tailgate of a truck. Claimant stated his low back pain from the 2000 injury resolved with no medical treatment.

Dr. Murati examined claimant and diagnosed him with lumbosacral strain and neck strain. He recommended that claimant do no above-shoulder-level work in both arms. Lifting, carrying, and pushing should be limited to 35 pounds occasionally. Claimant should

rarely bend, crouch or stoop. Claimant could occasionally climb stairs and ladders, squat, or crawl. Claimant could frequently sit, stand, walk, and drive, and could lift, carry, push, and pull to 20 pounds. Claimant should do no work more than 24 inches away from the body and should avoid awkward positions of the neck. Claimant should also alternate sitting, standing and walking. Dr. Murati stated that these restrictions applied only to claimant's workers' compensation condition.

Based on the *AMA Guides*,<sup>4</sup> Dr. Murati stated that claimant fell into the lumbosacral Diagnosis Related Estimate (DRE) Category II for a 5 percent whole person impairment. Dr. Murati also stated that claimant fell into the cervicothoracic DRE Category II for a 5 percent whole person impairment. Using the Combined Values Chart, these ratings combined for a 10 percent whole person impairment.

Dr. Murati reviewed the task list prepared by Doug Lindahl and opined that of the 19 tasks on the list, claimant would be unable to perform 6 of them for a 32 percent task loss. Because Dr. Murati eliminated two of the five tasks that claimant performed for respondent, it is apparent that claimant could not return to his regular job duties for respondent without accommodations.

On cross-examination, Dr. Murati testified that he did not know whether claimant had rheumatoid arthritis and that he was told just before the deposition that claimant had been diagnosed with lung cancer. However, he said that the restrictions he recommended for claimant applied only to his condition as caused by the work injury. He did not take into account any other medical condition in making those recommendations. Likewise, Dr. Murati's 10 percent permanent partial disability rating refers only to claimant's work injury to his neck and back.

Doug Lindahl is a vocational rehabilitation counselor. He visited with claimant on December 19, 2003, at the request of claimant's attorney. Mr. Lindahl prepared a task list outlining the tasks performed by claimant during the 15 years before his injury. There are 19 nonduplicative tasks set out on that list.

Mr. Lindahl testified that combining claimant's work-related injuries with his cancer and arthritis would make claimant unable to return to work at any substantial gainful activity. In contemplating only claimant's work-related injuries, Mr. Lindahl would put claimant in the light, medium work and opined that claimant would be able to earn \$8 per hour or \$320 per week. Mr. Lindahl also stated that without consideration of claimant's cancer or arthritis, it appears, at least within the restrictions of Dr. Bieri, that he was physically capable of returning to a job at respondent.

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<sup>4</sup>American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Dr. Bieri performed an IME of claimant on October 15, 2004, at the request of the ALJ. Dr. Bieri did not testify, but the record includes his written report of that examination. Along with a history of claimant's work-related injury, claimant told Dr. Bieri about his diagnosis of rheumatoid arthritis, which Dr. Bieri noted was only in claimant's hands and was not found in claimant's back. Claimant's diagnosis of lung cancer was also noted in this history.

Dr. Bieri found that claimant still had persistent and unrelenting pain in his entire back, worse in the cervical and lumbar spine regions. The pain radiates into both upper and lower extremities. Examination of the thoracic and lumbar spine revealed slight to moderate tenderness to palpation.

Dr. Bieri found that claimant incurred injury to his cervical and lumbar spine regions as a result of the work-related injury in July 2001. Claimant has additional diagnoses of peripheral rheumatoid arthritis and carcinoma of the lung, unrelated to the injury. Dr. Bieri found that claimant was at maximum medical improvement and found that claimant had a 5 percent DRE lumbosacral Category II rating and a 5 percent DRE cervicothoracic Category II rating, which combine for a 10 percent permanent partial disability rating.

Dr. Bieri found that claimant's restrictions would be in the light-medium category, which would limit occasional lifting to 35 pounds, frequent lifting not to exceed 20 pounds, and no more than 10 pounds constant lifting. He indicates that these restrictions are issued only regarding the cervical and lumbar spine regions and are not related to claimant's arthritis or cancer.

Dr. Bieri also reviewed the task list prepared by Doug Lindahl and opined that of the 19 nonduplicative tasks, claimant is unable to perform 5 of them, for a 26 percent task loss.

Although Dr. Bieri did not testify and, therefore, was not asked, it does not appear that claimant could have returned to his former job as a truck driver with respondent. Dr. Bieri opined that claimant could no longer perform task number 5, which required claimant to:

Make trailer adjustments such as moving rear axle forward or backward to even load distribution. Must pull heavy pin in axle, move trailer with tractor, and then reinsert pin. Also, open trailer doors to inspect load. Physical requirement: occasional reaching, handling, fingering, stooping, very heavy pulling.<sup>5</sup>

Dr. Bieri also eliminated additional tasks that claimant performed in other truck driving jobs.

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<sup>5</sup>Lindahl Depo., Ex. 2 at 4.

Permanent partial disability under K.S.A. 44-510e(a) is defined as the average of the claimant's work task loss and actual wage loss. But, it must first be determined that a worker has made a good faith effort to find appropriate employment before the difference in pre- and post-injury wages based on the actual wages can be used. If it is determined that a good faith effort has not been made, then an appropriate post-injury wage will be imputed based upon all the evidence, including expert testimony, concerning the capacity to earn wages.<sup>6</sup>

Respondent argues that claimant is not entitled to a work disability because he failed to return to work with respondent after being told that he would always have a job waiting for him. However, claimant was told this by someone who the record does not indicate had the authority to hire and fire. Furthermore, claimant was told this before he was given permanent restrictions. There is no indication in the record that respondent could have and would have accommodated those restrictions. The record further fails to establish that respondent would have continued to pay claimant at least 90 percent of his pre-injury AWW in any such accommodated position. It does not appear that claimant could return to his former unaccommodated job with respondent. As a result, the Board declines to impute a wage to claimant above the amount testified to by Mr. Lindahl, which the ALJ likewise accepted as the claimant's post-accident wage-earning ability.

As did the ALJ, the Board finds the opinions of Drs. Bieri and Murati to be the most credible opinions on the questions of causation and functional impairment. The Board affirms the ALJ's finding of a 10 percent impairment of function but will average the task loss opinions of Drs. Bieri and Murati to find claimant's task loss from the work-related injury to be 29 percent. When the 29 percent task loss is averaged with the 65 percent wage loss, claimant's permanent partial disability is 47 percent.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated January 17, 2006, is modified as follows:

The claimant is entitled to 36.97 weeks of temporary total disability compensation at the rate of \$417 per week or \$15,416.49, followed by 9.14 weeks of permanent partial disability compensation at the rate of \$417 per week or \$3,811.38 for a 10 percent functional disability, followed by 175.58 weeks of permanent partial disability compensation at the rate of \$417 per week or \$73,216.86 for a 47 percent work disability, making a total award of \$92,444.73.

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<sup>6</sup> *Parsons v. Seaboard Farms, Inc.*, 27 Kan. App. 2d 843, 9 P.3d 591 (2000); *Copeland v. Johnson Group, Inc.*, 26 Kan. App. 2d 803, 995 P.2d 369 (1999), rev. denied 269 Kan. 931 (2000); *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, rev. denied 267 Kan. 889 (1999).

As of May 12, 2006, there would be due and owing to the claimant 36.97 weeks of temporary total disability compensation at the rate of \$417 per week in the sum of \$15,416.49, plus 184.72 weeks of permanent partial disability compensation at the rate of \$417 per week in the sum of \$77,028.24, for a total due and owing of \$92,444.73, which is ordered paid in one lump sum less amounts previously paid.

The Board adopts the other orders of the ALJ to the extent they are not inconsistent with the above.

The Board notes that the ALJ did not award claimant's counsel a fee for his services. The record does not contain a fee agreement between claimant and his attorney. K.S.A. 44-536(b) requires that the Director review such fee agreements and approve such contract and fees in accordance with that statute. Should claimant's counsel desire a fee be approved in this matter, he must submit his contract with claimant to the ALJ for approval.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant  
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier  
Brad E. Avery, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director